Supreme Court of the United States

OCTOBER TERM, 1950.

No. 12, Original

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF LOUISIANA, *Defendant*.

REPLY TO PLAINTIFFS MEMORANDUM ON PROPOSED DECREE

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The memorandum filed by the plaintiff "in regard to Louisiana's Objections to the proposed Decree", portrays a complete absence of any legal basis whatever for the position in which the United States now finds itself. Said memorandum further shows that the proponents are on the defensive and are at a loss to justify their proposed decree under the Constitution, laws and treaties of the United States. We submit that it compels the conclusion that there is now no case or controversy before this Court and that the Complaint should be dismissed.

Point One

The Issue of Fee Simple Title Has Been Eliminated by the Court from This Case.

The Solicitor General states that there is no basis for Louisiana's objection to including in the proposed decree the sentence that, "The State of Louisiana has no title thereto or property interest therein". But his assertions, we submit, are fully answered by the fact that this Court in its decision herein on June 5, 1950, definitely stated that this litigation "does not turn on title or ownership in the conventional sense".

That the issue of title to Louisiana's submerged lands and resources was not decided by the Court in this case is further shown by the Court's refusal to grant Louisiana a trial on the issue of title to its marginal seabed and the lands and resources therein, after the Court had stated that (1) Louisiana in her answer had denied that the United States has fee simple title to the lands, minerals or other things underlying the Gulf of Mexico within her boundaries; (2) had set up affirmative defenses that she is the holder of fee simple title to all said lands, minerals and other things; and (3) that Louisiana had also moved for trial by jury on the ground that this action is essentially one to recover possession of real property, that is, the soil and resources of the marginal sea off Louisiana and so is essentially an action at law in which the State is entitled to a jury trial under the Constitution and Laws of the United States.

So, the Court eliminated the issue of title.

Point Two

Moreover, Plaintiff Has Now Specifically Abandoned All Claim to Fee Simple Title.

The plaintiff has now actually abandoned, in its proposed Decree, the very claim to fee simple title to Louisiana's tidelands and mineral resources—the marginal sea-

bed of Louisiana—which plaintiff made in its complaint. Paragraph II of its complaint alleged as follows:

> "At all times herein material, plaintiff was and now is the owner in fee simple of, or possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Gulf of Mexico, * * * "

But Paragraph 1 of the Decree proposed by plaintiff carefully omits the claim to fee simple title disjunctively made in the Complaint, merely asking that this Court decree that:

> "The United States is now, and has been at all times pertinent hereto, possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Gulf of Mexico, * * * "

So the plaintiff, having now abandoned its claim to fee simple title, the question of who has fee simple title is not before the Court in any respect whatever, and cannot be the basis of any decree.

Point Three

The California Decree Is No Precedent Whatever in This Case.

The California decree is no precedent whatever for the decree in this case, because there, California, in effect, consented to the entry of a decree which was proposed by the United States as plaintiff which stated that California had no title to the property. The decree in the California case was to that extent, therefore, a judgment by consent.

We submit that whatever the effect of that decree may be for California, it does not bind Louisiana at all. Louisiana has never consented to any such stipulation. She has always stood, and will ever stand, ready to submit evidence of the widest character portraying her fee simple title to

and right to possession of the area involved, undisputed for more than 136 years.

Point Four

There Is No Case or Controversy Regarding the Constitutional Paramount Rights, Powers and Dominion of the United States Over the Marginal Sea Within Louisiana's Boundaries.

There is no possible controversy over anything in this case except fee simple title. Even the Solicitor General himself said so, specifically, in his testimony before the Senate Committee on Interior and Insular Affairs, on October 4, 1949.

He then stated that the Government's claim to the tidelands and their mineral resources was based on the claim of title, and that if the United States did not have title, it was not entitled to them. See Hearings before said Committee, Pages 56, 180.

The Court's decision in this case definitely eliminated the question of fee simple title by holding that this litigation did not turn on title or ownership of the property in question. Necessarily, therefore, the question of title cannot be revived by the suggestion on Page 5 of Memorandum in Support of the Proposed Decree that the United States should have fee-title and ownership or proprietorship to the lands under navigable waters within Louisiana's boundaries.

And there never has been any controversy over the constitutional "paramount rights", "powers", "dominion" etc. of plaintiff over the marginal sea off Louisiana; for Louisiana has never denied them, and she has specifically admitted them in this litigation. Hence there are no "conflicting claims of governmental powers" here, as there were with California, (332 U. S. 1, 25); here there simply is no case or controversy whatever before this Court which could be used as the basis for a decree; and the complaint should be dismissed.

The supreme or paramount character of the rights, powers and dominion of the United States within its delegated governmental sphere has been the recognized law and jurisprudence in this country since at least 1819, when this Court, through Chief Justice Marshall, in *McCulbough v. Maryland*, 4 Wheat 403, held:

> "If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the union, though limited in its powers, is supreme within its sphere of action."

It is not amiss to point out that, so far as we have been able to ascertain, the phrase "paramount right" arose in the leading case of *McCready v. Virginia*, (1876) 94 U. S. 391. In that case the Court held:

> "The principle has long been settled in this Court that each state owns the beds of all tidewaters within its jurisdiction, * * * (cases cited). The title thus held is subject to the **paramount right** of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States". (Pages, 394,.395) (Emphasis added)

However, if a case or controversy could now be manufactured in this case with respect to "paramount rights, power or dominion" of the United States, where none exists because of the fact that Louisiana has never denied them, but to the contrary has consistently admitted them; then, in that event, Lousiana's Objections to Paragraph 1 of the Proposed Decree would be appropriate. Lonisiana's Objection was merely that the following words should be added to the proposed paragraph: "to the extent of all governmental powers existing under the Constitution, Laws and Treaties of the United States."

Unless the Executive Branch of the Government is arguing that this Court should decree it powers over and beyond those conferred by the Constitution, we submit that the words of Constitutional limits, quoted above, would

be essential. But again, we must point out that there is no issue before this Court as to "paramount rights", "power", "dominion", etc. of the plaintiff over the seabed within Louisiana's boundaries, and hence there is no basis for a decree on that subject, either.

Point Five

Plaintiff Now Asks This Court to Clothe It With the Very Power that Congress Has Specifically Refused to Grant, and Thus to Extinguish the Separation of Powers Embodied in the Constitution.

Plaintiff now asks this Court to empower what Congress has specifically refused to grant. The effect of the argument is to seek to extinguish the separation of powers embodied in the Constitution.

Plaintiff's position in its Proposed Decree in so far as it seeks an injunction is necessarily based on an assumption that plaintiff has fee simple title to lands under navigable waters within Louisiana's boundaries. We have shown above that that issue was eliminated by the Court; that plaintiff has now specifically abandoned, in its Proposed Decree, all claim to fee simple title; and that the issue of fee simple title is not now before the Court to become the subject of any decree.

From a different approach, however, perhaps nothing portrays plaintiff's utter lack of right to an injunction, accounting, etc. and the fact that it does not have fee simple title, than the action of Congress. For Congress has specifically refused to grant the plaintiff power to explore, lease, etc. the area involved. And from this we must infer that even Congress has firmly recognized that plaintiff does not have fee simple title to the area involved.

Further, plaintiff, having applied to Congress for the necessary legislative authority to lease, explore, take out, etc., the minerals in the marginal sea, and having been specifically refused such authority only three years ago, now asserts that the judicial power, through this Court, may do

what the legislative branch of the government has specifically refused to do. It needs no argument to demonstrate that this Court does not possess the legislative power assigned by the Constitution to Congress.

We may point out that plaintiff has placed itself in this feeble position through its own efforts. Not having fee simple title to the marginal seabed, and having now even abandoned all claims to fee simple title, plaintiff nevertheless wants to stop the oil drilling operations of Louisiana and its lessees. That such a cessation of operations would be disastrous to the national economy and the present grave emergency is something of which this Court may take judicial notice. In an effort to avoid these catastrophic consequences plaintiff now grandiosely asserts that the Secretary of Interior will permit the oil drilling operations to continue on such terms and provisions as he may see fit to grant, and that he should be considered by this Court, therefore, to possess the very authority to explore, lease, operate, etc. which Congress refused to purport to grant to him.

Thus, plaintiff nonchalantly asserts that, to be sure, Congress has enacted no such legislation, and that it has been held that the Mineral Leasing Act of February 12, 1920, 41 Stat. 437, as amended, does not apply to submerged lands of the type here involved,[1] but that regardless of the

[1] "After the Supreme Court decision in the California case, the question whether the Mineral Leasing Act applied to these areas became material. On August 8 and 28, 1947, the Solicitor of the Department of the Interior and the Attorney General, respectively, held that the act did not apply to the submerged coastal areas. Accordingly, on September 8, 1947, the Director of the Bureau of Land Management denied the applications pending in that Bureau, and on October 6, 1947, the Secretary of the Interior denied the applications pending in his office.

"There is no reason to think that the legal conclusions of the Solicitor and the Attorney General, and the consequent administrative actions denying all the then pending applications can be successfully challenged in the courts."

(Statement of Solicitor General, page 30, pamphlet "Submerged Lands", Government Printing Office, report of "Hearings before the Committee on Interior and Insular Affairs

absence of any Act of Congress, the Secretary of the Interior stands ready to authorize continued production of minerals from the States' tidelands and has full power to make "interim arrangements" to protect and preserve the lands and resources "adjudged" to the United States, and he points to an Executive Order, No. 9633.

Parenthetically, plaintiff can point to no "adjudging" of the tidelands and their mineral resources to the United States, because that would imply a holding that the United States has fee simple title thereto, contrary to the decision of this Court that title was not the issue in this case and to the fact that plaintiff has now actually abandoned all claim to fee simple title. And it is contrary, by analogy, to the Court's decree in the *California* case, where the United States was specifically denied proprietary rights in the tidelands and their resources, and which is a legal adjudication that the United States does not have fee simple title to the California marginal sea area.

U. S. Senate, 81st Congress, 1st Session", bills S. 155, S. 923, S. 1545, S. 1700 and S. 2153.)

Oil and Gas, (Act of February 25, 1920) secs. 13 and 14, 30 U. S. C. 221-236; oil shale, 30 U. S. C. 241; phosphate, 30 U. S. C. 211-214; sodium, 30 U. S. C. 261-163; potash, 30 U. S. C. 281-287; sulphur, 30, U. S. C. 271-276.

By Act, August 7, 1947, 30 U. S. C. 352, the Secretary of Interior was authorized to lease for oil and other minerals "acquired lands of the United States", to which the mineral leasing laws had not been extended; but it was provided: "That nothing in this chapter is intended, or shall be construed, to apply to or in any manner affect any mineral rights, exploration permits, leases or conveyances nor minerals that are or may in any tidelands; or submerged lands; or in lands underlying the three-mile zone or belt involved in the case of the United States of America against the State of California now pending on application for rehearing in the Supreme Court of the United States; or in lands underlying such three mile zone or belt, or the continental shelf, adjacent or littoral to any part of the land within the jurisdiction of the United States of America". The mineral leasing laws were not only not extended to the marginal sea, but Congress positively asserted that the Secretary of Interior should not exercise such authority under the law.

In apparent support of the Secretary of Interior's alleged power, the Solicitor General cites statements made to the Senate Committee on Interior and Insular Affairs, by the Attorney General and Solicitor for the Department of Interior during the Committe's hearings on S. J. 195, 81st Congress, which Resolution proposed to purport to confer interim authority in the Secretary of the Interior to administer the mineral resources in the States' tidelands.

But Congress did not enact S. J. Res. No. 195. It died aborning in the Senate Committee on Interior and Insular Affairs after a thorough hearing in August, 1950. The Congress of the United States undoubtedly refused to enact such legislation because it would thereby have adopted a policy of nationalization and confiscation of property, wherever the constitutional paramount powers and dominion of the United States extend, **and that is everywhere in the United States.**

Plaintiff's argument that, Congress having specifically refused to grant the authority sought, the judicial power should decree it, has far reaching implications. Such a contention would destroy the separation of powers around which the Constitution is constructed, extinguish the role of Congress, and transfer the legislative power to the judicial branch of the government.

The United States Constitution, Art. I, Sec. 8 provides:

> "The Congress shall have power . . . to regulate commerce with foreign nations and among the several states . . . to define and punish . . . offenses against the law of nations; and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." Article I, Section 8, Constitution of the United States.

The Supreme Court of the United States throughout its history on many occasions consistently has held that,

> "In the United States, sovereignty resides in the people, who act through the organs established by the Constitution. Chisholm v. Georgia, 2 Dall. 419, 471; Penhallow v. Doane's Administrators, 3 Dall. 54, 93; McCulloch v. Maryland, 4 Wheat. 316, 404, 405; Yick Wo v. Hopkins, 118 U. S. 356, 370.

And:

> "But until congress has acted, the courts of the United States cannot assume control over the subject as a matter of Federal cognizance. It is the Congress, and not the Judicial Department, to which the Constitution has given the power to regulate commerce with foreign nations and among the several States. The courts can never take the initiative on this subject." Transportation Co. v. Parkersburg, 107 U. S. 691, 700, 701.

And, again, in *Manchester* v. *Massachusetts*, 139 U. S. 240, this Court held that there was no power over a natural resource in the federal authorities which Congress "does not assert by affirmative legislation" (p. 266).

As against the suggestion of the Solicitor General that an executive order be given the force of legislation, to bypass Congress, it is well to refer to the statement made by an Associate Justice in *Adamson* v. *California*, (1947) 332 U. S. 46, 67 S. Ct. 1672, 1682 that

> "We must be particularly mindful that it is a *Constitution* we are expounding" and that the guidance of the past "bids us to be duly mindful of the heritage of the past, with its great lessons of how liberties are won and how they are lost".

CONCLUSION.

Louisiana reiterates its pleas and supporting memoranda herein and submits that the complaint should be dismissed for the following reasons:

1. This Court refused to permit Louisiana to submit her evidence in proof of her fee simple title to and right to

possession of the area involved, undisputed for more than 136 years. It eliminated the issue of fee simple title. Now, in its Proposed Decree, plaintiff has specifically abandoned the very claim to fee simple title which it made in its complaint. Accordingly, the whole matter of fee simple title is not now before this Court to become the basis of any decree at all.

2. There is not, and never has been, any case or controversy before this Court with respect to the constitutional paramount rights, dominion and power of the plaintiff over the area involved; and we defy the plaintiff to conjure up the slightest scintilla indicating any such thing. Indeed, we may say frankly that the hullabaloo raised by the plaintiff over its "paramount rights in, power and dominion over" the area involved is sheer nonsense, wholly without substance, and that there is no case or controversy between the United States and Louisiana to provide a basis for a decree on that subject.

3. In the face of the foregoing, by seeking, nevertheless, to have this Court clothe plaintiff with the very authority to explore, lease and take out the minerals in the area involved, which Congress specifically refused to grant to it, plaintiff raises a contention with vast implications. It would necessarily destroy the separation of powers and disrupt our system of government.

If this Court should now sustain the contention of the Solicitor General that an Executive Order or Judicial Decree should be substituted for the constitutional legislative prerogative of Congress, then it might well follow that an Executive Order might be written to abolish the Congress altogether. Or the Solicitor General could then ask for a judicial decree suspending the constitutional powers of Congress.

4. Finally, what plaintiff apparently seeks as a practical matter, if we are to be frank about it, is "nationalization"

—confiscation by the federal government—of the lands, minerals, etc. underlying the navigable waters within Louisiana's boundaries. But that claim has no legal basis; we submit, therefore, that it has no standing within the walls of the Constitution and the tradition of this Court.

The pending Petition for Rehearing should be granted and the complaint should be dismissed; or the case should be restored to the docket for argument on the Proposed Decree and Louisiana's Objections.

Respectfully submitted,

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